

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE D. HUBBARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

APR 2 - 1935

PAUL P. O'BRIEN,
Clerk

NO. 7772

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

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Seattle, Washington

MR. J. CHARLES DENNIS
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Seattle, Washington [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States District Court, Western District of
Washington, Northern Division.

May Term, 1934.

No. 43406

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE D. HUBBARD,

Defendant.

INDICTMENT.

United States of America,
Western District of Washington,
Northern Division.—ss:

Violation Section 183,
Title 18, U. S. C. A.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

THAT GEORGE D. HUBBARD, whose true and full name is to the Grand jurors unknown, on or about the tenth day of November, in the year of our Lord one thousand nine hundred thirty-two, the exact date being to the grand jurors unknown, at the city of Seattle, in the Northern Division of the Western District of Washington,

and within the jurisdiction of this Court then and there being, and being then and there the duly appointed, sworn, qualified and acting Collector of Customs for the United States of America for Customs Collection District Number Thirty (30), did then and there knowingly, wilfully, unlawfully and feloniously convert to his own use and thereby embezzle certain property, to-wit: approximately eighty-four (84) quarts of intoxicating liquor, the exact amount and kinds thereof being to the grand jurors unknown, which had theretofore come into his possession and under his control [2] in the execution of his office and employment as such Collector of Customs, as aforesaid, and under color and claim of authority as such Collector of Customs, all in violation of Section 97 of the Penal Code, the same being Section 183 of Title 18, of the United States Code, as he, the said GEORGE D. HUBBARD, then and there well knew; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SAM E. WHITAKER

Special Assistant to the Attorney General.

J. CHARLES DENNIS

United States Attorney.

[Endorsed]: A True bill,

John Young

Foreman.

J. Charles Dennis.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court July 26, 1934. EDGAR M. LAKIN, Clerk, By F. W. Moses, Deputy. [3]

[Title of Court and Cause.]

DEMURRER.

Comes now the defendant George D. Hubbard and demurs to the indictment herein and each and every count thereof upon the following grounds:

I.

Neither the indictment as a whole, nor any count in said indictment, states or alleges facts which constitute a violation of the laws of the United States.

II.

Neither the indictment as a whole, nor any count in said indictment, states or alleges sufficient facts to constitute against the defendant George D. Hubbard an offense against the laws of the United States.

III.

The indictment as a whole and each and every count in said indictment is so vague, indefinite and ambiguous that the defendant George D. Hubbard is not sufficiently advised as to the nature and cause of the charges against him so that he can properly prepare and submit his defenses thereto.

IV

The indictment, and each and every count in said indictment, is too vague, indefinite and uncertain to charge any facts sufficient in law to constitute any crime or offense or to fully inform the defendant George D. Hubbard of the charge against him or to make the same clear to a common understanding.

V.

The indictment, and each and every count in said indictment, fails to state or allege facts sufficient to charge the defendant with any crime or offense against the United States or any law thereof and does not describe any crime or offense in violation of or punishable under the laws thereof. [4]

WHEREFORE the defendant George D. Hubbard prays that the indictment, and each and every count thereof, be quashed and that he go hence without day.

ANTHONY SAVAGE

Attorney for defendant George D. Hubbard.

Received a copy of the within Demurrer this 10th day of Sept. 1934.

SAM E. WHITAKER

Attorney for Ptf.

[Endorsed]: Filed Sep 10 1934 [5]

[Title of Court and Cause.]

HEARING ON DEMURRER TO INDICTMENT.
(Overruled)

Now on this 28th day of September, 1934, this cause comes on for further hearing on demurrer to the indictment, and motion for bill of particulars. The Court having heard heretofore the arguments of counsel herein and taken the matters under advisement, and having thereafter received and considered the briefs of counsel, now announces ruling from the bench overruling the demurrer and denying the motion for a bill of particulars. The Clerk is to notify counsel. Exception is noted to said defendant as to each of said rulings of the Court.

Journal No. 22 Page 417. [6]

District Court of the United States
Western District of Washington
Northern Division

No. 43406

UNITED STATES OF AMERICA

Plaintiff

vs.

GEORGE D. HUBBARD,

Defendant.

VERDICT

WE, THE JURY IN THE ABOVE-ENTITLED CAUSE, FIND the defendant GEORGE D. HUBBARD is guilty as charged in the Indictment herein.

A. J. ALLEN
Foreman.

[Endorsed] : Filed Dec. 8, 1934 [7]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, George D. Hubbard, and moves the court for an order granting a new trial upon the following grounds:

1. The verdict of the jury is contrary to the evidence;
2. The verdict of the jury is contrary to law;
3. There was irregularity in the conduct of counsel for the government which prevented the defendant from having a fair trial;
4. Error in law occurred during the trial, to which error the defendant took an exception;
5. There was irregularity in the proceedings of the Court and jury which prevented the defendant from having a fair trial;

6. The Court erroneously instructed the jury on the definition of the crime of embezzlement to which instruction the defendant took an exception.

ANTHONY SAVAGE
JOHN J. SULLIVAN
Attorneys for Defendant Hubbard.

Service acknowledged. Dec. 10, 1934.

SAM E. WHITAKER
Sp. Asst. to Atty Gen.

[Endorsed]: Filed Dec. 10 1934 [8]

[Title of Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL
(Denied)

Now on this 4th day of February, 1935, J. Charles Dennis, United States District Attorney, appearing for the plaintiff and Anthony Savage, Esq., and John J. Sullivan, Esq., appearing for the defendant, this cause comes on for hearing on motion for new trial. The motion is argued by counsel and is denied. Exceptions is allowed.

Motion in arrest of judgment is argued and denied. Exception is allowed.

In the United States District Court for the Western
District of Washington Northern Division.

Judge Bowen presiding:

No. 43406

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE D. HUBBARD,

Defendant.

SENTENCE.

Comes now on this 4th day of February, 1935, the said defendant, George D. Hubbard, into open court for sentence, and being informed by the court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and the premises, it is considered, ordered, and adjudged by the court that the defendant is guilty of embezzling certain intoxicating liquor and converting to his own use as charged in the indictment in violation of Section 183, Title 18, U. S. C. A., and that he be punished by being committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment in the Federal Prison Camp at Fort Lewis, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of

the United States, for the period of eleven (11) months, and to pay a fine of \$1000.00, with civil execution only as to said fine. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

The defendant's counsel advise the court that an appeal will be taken and asks that the amount of the appeal bond be fixed. The United States District Attorney consenting appeal bond is fixed in the sum of \$2500.00 and the defendant permitted to go on his present bond until appeal bond is furnished, provided it is filed today, otherwise written consent of sureties on present bond must be filed that it may stand until a new bond is filed.

Judgment & Decree #9 Page 118. [10]

[Title of Court and Cause.]

NOTICE OF APPEAL.

Name and address of appellant: George D. Hubbard, 4622 East 40th Avenue, Seattle, Washington

Name and address of appellant's attorney: Anthony Savage, 955 Dexter Horton Building, Seattle, Washington

Offense: Violation of Section 183, Title 18, U. S. C. A.—felonious conversion and embezzlement of eighty-four (84) quarts of intoxicating liquor which had theretofore come into the possession and control of the defendant in the execution of his office and employment as Collector of Customs for the United States Collection District No. 30.

Date of Judgment: February 4, 1935.

Description of Judgment or Sentence: Eleven (11) months at Federal Road Camp located at Fort Lewis, Washington, and a fine of One Thousand Dollars (\$1,000.00) to be collected by civil execution only.

Name of prison where now confined, if not on bail: At liberty on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

GEORGE D. HUBBARD

Appellant

Dated: February 6 1935. [11]

Grounds of Appeal:

The trial court erred in giving the following instructions:

1. "The Collector of Customs, during all of the times mentioned in the indictments, was an officer of the United States Government. As a part of his duties there came into his possession and control alcohol and intoxicating liquors. It was his duty, as Collector of Customs, upon receipt of alcohol and intoxicating liquors that came into his possession and control, to cause the same to be destroyed unless said alcohol and intoxicating liquors could be used for official government purposes after authority for such use had been duly and regularly obtained

from the Commissioner of Customs. Under the law he had *not* right to convert the alcohol or intoxicating liquors to his own use or to give it to any other person, or to exchange it for other alcohol without such authority. Therefore, if you find from the evidence that the defendant, George D. Hubbard, made any disposition of alcohol or intoxicating liquors other than the destruction of the same in accordance with the law, or the use of the same for governmental purposes after authority had been duly and regularly obtained, then the said defendant is guilty of the crime of embezzlement, as charged."

2. "Intent to defraud is presumed when the unlawful act is proved to have been knowingly committed."

3. "If he gave it to one who was not entitled to its use and enjoyment, with the intent to deprive the true owner thereof, or permitted such person to take it and use it and enjoy it with the intent to deprive the true owner thereof, he is likewise guilty of the crime of embezzlement."

4. "I have heretofore defined embezzlement. In the second case, the defendant, George D. Hubbard alone is charged with embezzling eighty-four (84) quarts of intoxicating liquor which had been seized on board the motorship *Heranger*, and which came into his possession as Collector of Customs. If you find this liquor had been seized under the customs laws and did

come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so, with intent to deprive the true owners thereof, he would be guilty as charged.”

5. The trial court further erred in failing to instruct the jury as to the meaning of the words “wrongful conversion”.

6. The trial court further erred in failing to instruct the jury that intent to defraud is an essential element of the claim of embezzlement and that such intent to defraud had to be proven beyond a reasonable doubt before the defendant could be found guilty.

Received a copy of the within Notice this 6 day of Feb. 1935.

J. CHARLES DENNIS, Atty for Pltff.

[Endorsed] : Filed Feb. 6, 1935 [12]

[Endorsed] : Filed Mar 1-1935

Lodged in the United States District Court, Western District of Washington, Northern Division, Feb. 26, 1935. Edgar M. Lakin, Clerk. By S. Cook, Deputy.

[Title of Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that on the 27th day of November, 1934, at 10 o'clock in the forenoon, the above entitled cause was duly called for trial before the Honorable John C. Bowen, one of the judges of

the above entitled court. The plaintiff was represented by Mr. Sam A. Whittaker, special assistant to the Attorney General of the United States, Mr. C. Charles Dennis, United States District Attorney, and Mr. Frank Pellegrini, Assistant United States District Attorney; the defendant, George D. Hubbard was present in person and represented by his attorneys, John J. Sullivan and Anthony Savage.

Thereupon the Court proceeded to empanel a jury to try the cause, and the jurors being called, came, and were then and there chosen and sworn to try the issue.

Thereupon the defendant renewed his demurrer to the indictment upon the same grounds as set forth in the demurrer made and filed prior to the trial and objected to the introduction of any evidence in support of said indictment; which demurrer was overruled and motion denied, to each of which rulings by the Court the defendant took his exception.

Thereupon the plaintiff to sustain the issue upon its part called several witnesses whose testimony tended to show that the [13] defendant had unlawfully converted intoxicating liquor and alcohol to his own use, and that he had delivered whiskey and alcohol to the United States Coast Guard Service and to the United States Coast and Geodetic Survey without first obtaining authority so to do from the Commissioner of Customs as prescribed by the Regulation of the Secretary of the Treasury promulgated under the Tariff Act of 1930, and that he

authorized, and certified to the destruction of intoxicating liquors and alcohol, which destructions had not been carried out in the manner prescribed by the Regulations of the Secretary of the Treasury promulgated under the Tariff Act of 1930.

Thereupon at the close of the plaintiff's case, the defendant introduced testimony in his own behalf, tending to rebut the evidence presented by the plaintiff.

Thereafter the plaintiff called upon several witnesses whose testimony tended to rebut some of the evidence produced by the defendant in his own behalf.

Defendant's requested instructions:

By certain counts of the indictments herein, the Defendant Hubbard is charged with a substantive offense. In other counts he is charged with conspiring with others to commit a substantive offense. In this connection I instruct you as a matter of law that it is your duty to consider the evidence with reference to these charges separately. It is your duty to return a verdict of not guilty on the counts charging the substantive offenses, unless you are convinced beyond all reasonable doubt that the Defendant Hubbard committed the substantive offenses charged therein. With reference to the conspiracy count, I instruct you as a matter of law that a man cannot conspire with himself and unless you find that the Defendant Hubbard did agree, expressly or impliedly, with some other person or persons, to do the acts which [14] are charged that he con-

spired to do in the conspiracy count, and unless you are convinced of this beyond all reasonable doubt, it is your duty to return a verdict of not guilty on such count.

A conspiracy is not an omnibus charge under which the prosecution can prove anything and everything. The charge or accusation is limited by the terms of the indictment. The indictment here charges but one plan, one scheme, one conspiracy—and no defendant can be convicted thereunder unless it is shown beyond a reasonable doubt that he was a member of that conspiracy or a party to that scheme. (Furthermore the scope of the conspiracy must be gathered from the testimony and not from the averments of the indictment. The latter may limit the *scope* but cannot extend it.) Proof of another conspiracy than the one alleged can not support a conviction in this case.

You are further instructed that each of these defendants has entered a plea of not guilty to this indictment, and the effect of those pleas is to place upon the government the burden of establishing each and every of the essential elements of the charges as set forth in the indictment by credible evidence to your satisfaction beyond all reasonable doubt, and each of the defendants is presumed innocent of the charges contained in the indictment, and this presumption is one of their important rights, not to be ignored or lightly considered either by the court or by the jury. It is one of the several rights which the law accords all persons accused.

It attaches to them and continues with them throughout all stages of the trial, and throughout all stages of your deliberations until it has been overcome by the evidence in the case, and the guilt of a particular defendant has been established beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons; and by [15] the expression "reasonable doubt" is meant in law, just what those words in their ordinary and every-day use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable. It is such a doubt, as, if entertained by a person of ordinary prudence, sensibility and decision, would allow to have influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt and it must rise out of the honest minded, common-sense consideration and application of the evidence in the case or from lack of evidence in the case.

An offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis, but that of guilt of the offense imputed to the defendant. Each circumstance must be proved beyond a reasonable doubt; the circumstances must all be consistent with one another; they must all be con-

sistent with guilt and inconsistent with innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires the defendant be given the benefit of the doubt and the theory of innocence be adopted.

I instruct you as a matter of law that you are the sole and exclusive judges of the credibility of witnesses and of the credit to be given to the testimony of any witness who has testified in this cause. In this connection I further instruct you that while you ought to be slow to believe that any witness has wilfully testified falsely in this case, nevertheless, if you are [16] convinced that any witness has wilfully testified falsely to some material matter in the case, then you are at liberty to disregard his testimony in all other respects unless it be corroborated by other credible proof.

Some of the witnesses who have testified for the government in this case are by their own testimony participants in the unlawful acts alleged in the indictment to have been done by the defendant. I charge you as a matter of law that such witnesses are by their testimony accomplices and while in the Federal Court it is the law that a jury may convict upon the uncorroborated testimony of an accomplice, if believed, nevertheless the law recognizes that such testimony comes from a polluted source and is to be received with caution by the jury and weighed and scrutinized with great care.

You are instructed that the purpose and function of evidence of good character is to raise a reasonable doubt and that such evidence is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful; evidence has been introduced upon the trial of this case tending to show and establish that the defendant Hubbard is a man whose reputation for truth and veracity and as a law-abiding citizen has been good; when this evidence is considered by you along with the other evidence introduced at the trial, if a reasonable doubt is created as to said defendant's guilt by the fact of his good character, he is entitled to be acquitted.

The court instructs you that if you believe the general reputation of any witness in this case has been impeached for truth, you are at liberty to reject his testimony entirely.

You are further instructed that if you find a witness to have been successfully impeached, you may entirely disregard his [17] *his* or her testimony except in so far as he or she is corroborated by other creditable testimony or by facts or circumstances satisfactorily proved on the trial.

Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt. In considering the evidence in this case I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the de-

defendant's guilt, but before you can find the defendant guilty you must believe beyond a reasonable doubt that it is inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

(11) The Court instructs you that it is the function of a lawsuit to get at the truth of a case and that it is the duty of the parties to a lawsuit to exhaust reasonably within their power, as the jury reasonably sees the power is within their reach, the avenues of testimony leading to a determination of the truth, and, in determining where the facts of this case lie, it is proper for you to look to the manner in which this case is presented to you to determine whether or not the parties to this case, either or both of them, have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the reason of things, as these circumstances illuminate your judgment, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any proposition, who were not put upon the stand, you are permitted to draw such inferences as reasonable men would draw under such circumstances [18] from the failure to employ such opportunity.

(12) If you find from a consideration of all the evidence in this case against the defendants or any of them, that the evidence so produced is as consistent with their innocence as with their guilt, then, I instruct you, as a matter of law, that you must re-

turn a verdict of not guilty against any such defendant or defendants.

After counsel for the plaintiff and for the defendant had argued the case to the jury, the court instructed the Jury as follows: [19]

COURT'S INSTRUCTIONS TO JURY

December 7, 1934

BOWEN, District Judge:

Members of the Jury: You have heard the testimony and listened to the arguments of counsel. After the court instructs you you will retire to the jury room to consider your verdict.

The case in which Howard R. Crow was named as a defendant has been dismissed as to him and in your deliberations in the jury room you will not be concerned with his guilt or innocence.

By agreement of the parties and the order of the court in the case of *United States vs. George D. Hubbard, Samuel Lewis, Perry V. Wilcox and Howard R. Grow* (No. 43403), and the case of *United States vs. George D. Hubbard* (No. 43406) are being tried together.

In the case of *United States vs. George D. Hubbard, Samuel Lewis, Perry V. Wilcox and Howard R. Crow*, the case as to the defendant, Howard R. Crow, as previously stated has been dismissed, and the defendants now before the Court, George D. Hubbard and Perry V. Wilcox, are charged by the grand jury in the first count of this case with having entered into a conspiracy between themselves and

with others in the city of Seattle, King County, Washington, some time in the early part of 1930, to embezzle and wrongfully convert to their own use intoxicating liquors then in the possession of George D. Hubbard by virtue of his office as Collector of Customs for this district, which conspiracy, it is alleged, continued until the first day of August, 1933; and with having committed certain overt acts as set out in the indictment in furtherance of the conspiracy.

In the second count of this indictment these defendants [20] are charged with having entered into a conspiracy between themselves and with others at the same time and place to defraud the United States by impairing, obstructing or defeating the lawful function of the Treasury Department of the United States in its administration of the Tariff Act, first, by converting to their own use, or to the use of some one or more of them, intoxicating liquors which were in the possession or might thereafter come into the possession of the defendant, George D. Hubbard, by virtue of his office as Collector of Customs; and, second, by themselves executing and causing others to execute false certificates showing the destruction of the liquor converted to their own use; and, third, by falsifying or causing the falsification of a record known as "Receipt and Delivery of Seized Goods".

In the case against George D. Hubbard alone (No. 43406), he alone is charged with having converted to his own use and having embezzled eighty-

four (84) quarts of intoxicating liquors which had come into his possession by virtue of his office as Collector of Customs. The other defendant on trial, Perry V. Wilcox, is not concerned in any way in this second case charging George D. Hubbard with embezzlement.

You are the exclusive judges of the facts. In determining what the true facts of the case are, you will weight and examine the testimony of each and every witness that has been introduced by both the government and by the defendants, giving to the testimony of each witness such weight as you in your own judgment think that testimony deserves.

You are the sole judges of the credibility of the witnesses, and in determining the weight to which you think the testimony of each witness is entitled, you will take into consideration the demeanor of the witness on the witness stand, his [21] opportunity or lack of opportunity of knowing the facts about which he testifies, his interest or lack of interest in the case, if any, the reasonableness of his story, and from all these facts and circumstances you will determine the weight to which the testimony of each of the witnesses is entitled.

When a defendant testifies on his own behalf the law is the same in respect to him as in respect to any other witness. You may consider what interest he has in the outcome of the case, and whether that interest has been sufficient to lead him to deny things that really are true, or to testify falsely in any particular. You will weigh the testimony of

each defendant in the same manner you would weigh the testimony of anyone else, considering his position.

If you find that a witness has testified falsely in any one particular, you may disregard any other testimony of that witness, unless corroborated to your satisfaction by other evidence, or by other facts and circumstances.

To the indictments and to both of the counts of the indictment charging the two defendants now on trial with conspiracy (being cause No. 43403), each and every one of them has entered a plea of "not guilty"; and George D. Hubbard has entered a plea of "not guilty" to the charge of embezzlement in the case in which he is indicted alone, being cause No. 43406.

This plea of "not guilty" puts in issue every material allegation of the indictments and each count thereof, and casts on the government the burden of proving the guilt of the defendants beyond a reasonable doubt.

Each of the defendants on trial, as well as every defendant in a criminal case, is presumed innocent of the charges contained in the indictment until he is proved guilty beyond a [22] reasonable doubt, and this presumption is one of their important rights, not to be ignored or lightly considered either by the court or by the jury. It is one of the several rights which the law accords all persons accused. It attaches to them and continues with them throughout all stages of the trial and throughout all stages of your deliberations until it has been

overcome by the evidence in the case, and until the guilt of a particular defendant has been established beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons; and by the expression "reasonable doubt" is meant in law, just what those words in their ordinary and every day use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable. It is such a doubt, as, if entertained by a person of ordinary prudence, sensibility and decision, he would allow to have influence him in trasacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt and it must rise out of the honest minded, commonsense consideration and application of the evidence in the case or from lack of evidence in the case.

Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt.

In considering the evidence in this case I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find the defendant guilty you must believe beyond a reasonable doubt that it is inconsistent with his

[23] innocence and inconsistent with every other reasonable hypothesis except that of guilt.

In case No. 43403, in which both of the defendants, Hubbard and Wilcox, are jointly charged, they are charged with having conspired to do the acts alleged.

A conspiracy may be defined as a combination or agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the doing of some act by some one or more of them for the purpose of carrying the conspiracy into effect. It is not necessary that the act or acts done should consummate the conspiracy. It is only necessary that it be done for the purpose of carrying the conspiracy into effect, whether it was finally consummated or not.

In considering your verdict as to each of the defendants, Hubbard and Wilcox, you will first consider whether or not a combination or agreement to do an unlawful act existed, as charged, and if you find from the evidence beyond a reasonable doubt, such a combination or agreement did so exist, you will then consider which one of the defendants was a party to that agreement. It is, however, unnecessary that all the parties charged should have been party to the agreement when it was originally formed. If, after the formation of the original agreement, any other one of the alleged conspirators joined in the conspiracy, or, in other words, became a party to the agreement, he would be equally guilty with those who originally entered into the agreement. And, if you find that either or

both of those charged were not parties to the conspiracy in the beginning, but later did some act, with knowledge of the conspiracy, which in natural consequence had the effect of furthering the object of the conspiracy, or which was intended to further its objects, they would [24] be equally guilty with those originally forming the conspiracy. On the other hand, if some one or more of the defendants did an act having the effect of furthering the objects of the conspiracy, but if he did it in ignorance of the existence of the conspiracy, he would not be guilty, although some one of the conspirators procured him to do the act. But a person cannot close his eyes to that which is obvious. If any of the conspirators knew of any facts or circumstances that would lead a person of his intelligence to suspect the existence of an unlawful agreement, and that the act done by him would probably have the effect of furthering such agreement, it would be his duty to make inquiry as to whether such an agreement existed in fact before doing the act; and if he did such an act without making such inquiry, and if such act had as its natural consequence the furtherance of the objects of the conspiracy, he would be guilty.

Nor is it necessary that it be proven that the defendants conspired with each other, if it be shown that some one of the defendants conspired with some one or more of the persons with whom the indictment alleges he conspired, although such person be not named as a defendant.

Now, in the first count of the indictment for

conspiracy, the defendants are charged with a conspiracy among themselves and others named in the indictment to embezzle and to convert to their own use or to the use of some one or more of them intoxicating liquors which were then and might thereafter come into the possession of the defendant, George D. Hubbard, by virtue of his office as Collector of Customs for this district. The law makes it a crime for any officer of the United States to embezzle or wrongfully convert to his own use property which had come into his possession or under his control in the execution of his of- [25] fice or employment, whether the property shall be the property of the United States or of some other person. I charge you that under the law the Collector of Customs has the possession of, and is responsible for the custody of, and the disposition of, property seized under the customs laws, and such officer was so responsible and had such possession during the period covered by this indictment.

The Collector of Customs, during all of the times mentioned in the indictments, was an officer of the United States government. As a part of his duties there came into his possession and control alcohol and intoxicating liquors. It was his duty, as Collector of Customs, upon receipt of alcohol and intoxicating liquors that came into his possession and control, to cause the same to be destroyed unless the said alcohol and intoxicating liquors could be used for official government purposes after authority for such use had been duly and regularly obtained from the Commissioner of Customs. Under the law he

had no right to convert the alcohol or intoxicating liquors to his own use or to give it to any other person, or to exchange it for other alcohol without such authority. Therefore, if you find from the evidence that the defendant, George D. Hubbard, made any disposition of alcohol or intoxicating liquors other than the destruction of the same in accordance with the law, or the use of the same for governmental purposes after authority had been duly and regularly obtained, then the said defendant is guilty of the crime of embezzlement, as charged.

Embezzlement may be defined to be the wrongful appropriation to one's own use of the property of another which was at the time in his possession and control, with intent to deprive the true owner thereof. But it is not necessary that the person [26] charged with the custody of it should himself enjoy the property or the use of it. If he gave it to one who was not entitled to its use and enjoyment, with the intent to deprive the true owner thereof, or permitted such person to take it and use it and enjoy it with the intent to deprive the true owner thereof, he is likewise guilty of the crime of embezzlement.

It is not necessary that the true owner of the property should suffer a financial loss by its misappropriation; nor that the true owner intended to use and enjoy it. A party may be guilty of embezzlement of property although the true owner meant to destroy it. Especially is this true where the true owner intended to destroy it to prevent its use by others.

By certain counts of the indictments herein, the defendant Hubbard is charged with a substantive offense. In other counts he is charged with conspiring with others to commit a substantive offense.

In this connection I instruct you as a matter of law that it is your duty to consider the evidence with reference to these charges separately. It is your duty to return a verdict of not guilty on the counts charging the substantive offenses, unless you are convinced beyond all reasonable doubt that the defendant Hubbard committed the substantive offenses charged therein.

With reference to the conspiracy count, I instruct you as a matter of law that a man cannot conspire with himself and unless you find that the defendant Hubbard did agree, expressly or impliedly, with some other person or persons, to do the acts which are charged that he conspired to do in the conspiracy count, and unless you are convinced of this beyond all reasonable doubt, it is your duty to return a verdict of not [27] guilty as to him on such count.

A conspiracy is not an omnibus charge under which the prosecution can prove anything and everything. The charge or accusation is limited by the terms of the indictment. The indictment here charges but one plan, one scheme, one conspiracy, and no defendant can be convicted thereunder unless it is shown beyond a reasonable doubt that he was a member of that conspiracy or a party to that scheme. Furthermore, the scope of the conspiracy must be gathered from the testimony

and not from the averments of the indictment. The latter may limit the scope but cannot extend it. Proof of another conspiracy than the one alleged can not support a conviction in this case.

An offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis, but that of guilt of the offense imputed to the defendant. Each circumstance must be proved beyond a reasonable doubt. The circumstances must all be consistent with one another; they must all be consistent with guilt and inconsistent with innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires the defendant be given the benefit of the doubt and the theory of innocence adopted.

As elsewhere instructed in these instructions, you are the sole and exclusive judges of the credibility of witnesses and of the credit to be given to the testimony of any witness who has testified in this cause. In this connection I further instruct you that while you ought to be slow to believe that any [28] witness has wilfully *testied* falsely in this case, nevertheless, if you are convinced that any witness has wilfully testified falsely to some material fact in the case, then you are at liberty to *desregard* his testimony in all other respects unless it be corroborated by other credible proof.

Some of the witnesses who have testified for the government in this case are by their own testimony participants in the unlawful acts alleged in the indictment to have been done by the defendant. I charge you as a matter of law that such witnesses are by their testimony accomplices and while in the Federal Court it is the law that a jury may convict upon the uncorroborated testimony of an accomplice, if believed, nevertheless the law recognizes that such testimony comes from a polluted source and is to be received with caution by the jury and weighed and scrutinized with great care.

You are instructed that the purpose and function of evidence of good character is to raise a reasonable doubt, and that such evidence is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful. Evidence has been introduced upon the trial of this case tending to show and establish that the defendant Hubbard is a man whose reputation for truth and veracity and as a law abiding citizen, and as an honest government official has been good; when this evidence is considered by you along with the other evidence introduced at the trial, if a reasonable doubt is created as to said defendant's guilt by the evidence of his good character, he is entitled to be acquitted.

Evidence has been offered in this case that one of the defendants, Lewis, indicted with the other defendants, has not yet been apprehended. The court instructs you with reference to [29] this evidence that no presumption or inference of any kind or character can be indulged in by the jury

with reference to the defendants now on trial in this case and in addition thereto that these defendants now on trial are in no wise responsible for any act or acts of the defendant Lewis since the return of this indictment brought by the grand jury.

You are instructed that when it is successfully proven that the general reputation of a witness for general moral character or for truth and veracity is bad, the witness is impeached and the jury will be warranted in disregarding the testimony of such witness as unworthy of belief, except in so far as the same is corroborated by other credible testimony.

You will note that the indictment purports to charge a number of so-called overt acts. You are instructed that mere proof of an overt act, or overt acts, as charged in the indictment, alone proves no conspiracy, without further proof beyond a reasonable doubt of an unlawful agreement or combination entered into by two or more persons charged in the indictment herein, to commit the unlawful acts charged in the indictment. This is true even though the evidence shows the overt act or overt acts alleged to be unlawful in themselves.

You are further instructed that such overt act or overt acts must be found from the evidence to be clearly referable to such unlawful agreement, provided you find from the evidence that such unlawful agreement in fact did exist as alleged in the indictment. Even participation in the offense itself which is alleged to be the object of the conspiracy, does not necessarily prove the participant

guilty of such conspiracy. There must in addition thereto be proof beyond a reasonable doubt of the unlawful agreement and participation therein by the particular defendant or defendants with knowledge on his or their part of [30] the existence of the unlawful agreement charged in the indictment. These matters must be proved beyond a reasonable doubt, not by a presumption based upon another presumption, which might arise from the evidence, but only upon facts introduced in evidence by credible witnesses before you. The unlawful agreement is the gist of the offense of conspiracy and unless you find two or more of the persons named in the indictment herein so entered into the unlawful agreement specifically charged in the indictment herein, and actively participated therein, and that one or more of the defendants committed at least one of the overt acts alleged in the indictment, with knowledge of such unlawful agreement, you are not at liberty to return a verdict of guilty herein.

You are instructed that the law gives rise to a presumption that persons in the discharge of their duties are always prompted by honest motives. You will accord to the defendants herein, and each of them, the benefit of such presumption, until it is overcome by evidence convincing you beyond reasonable doubt and to a moral certainty, that a particular defendant or particular defendants, are or were not, prompted by such honest motives.

If you believe from the evidence that any defendant or defendants committed one or more of the overt acts charged in the indictment while carry-

ing out the instruction of a superior officer and while acting honestly and in good faith and without knowledge of the existence of any conspiracy or intent to further the same, such defendant or defendants cannot be found guilty on either count charged in the conspiracy indictment and you must acquit such defendant as to such indictment.

You are instructed that mere knowledge of an unlawful conspiracy on the part of an individual defendant, or mere knowledge on his part of an unlawful act in the furtherance of such [31] conspiracy, is not sufficient to make such individual defendant a member of such conspiracy or a party to same, but before he is deemed criminally liable, it must appear from the evidence beyond a reasonable doubt that he actively participated in such conspiracy and knowingly and intentionally committed some overt act in the furtherance of such conspiracy.

You are instructed that the indictment and the statements therein contained are not evidence of guilt of the defendants or any of them; but that the indictment is merely a paper charge. No inference should be drawn against the defendants or any of them, from the mere fact that the indictment has been returned against them and the guilt or innocence of the defendants and each of them must be determined by you solely from credible evidence introduced in the trial before you, and not from the statements set forth in the indictment.

You are instructed that to constitute a conspiracy, there must have been an agreement between the

of

defendants, a unity ~~and~~ design and purpose, and an overt act or acts committed by one or more of the defendants for the purpose of effecting the object of the conspiracy.

You are instructed that intent is an essential element of the crime charged and it is the duty of the government to prove guilty knowledge on the part of each defendant, and before you can find any defendant guilty of such crime, you must find that such defendant had an intention to take part in the conspiracy and had an intent to defraud the United States or to commit an offense against the United States, as charged in the indictment, and if you believe from the evidence that one or more of the defendants did not have such intent, you must acquit such defendant or defendants.

Intent is an ingredient of crime. It is psychologically [32] impossible for you to enter into the mind of the defendants and determine the intent with which they operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all the circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. The color of the act determines the complexion of the intent. Intent to defraud is presumed when the unlawful act is proved to have been knowingly committed.

There are two kinds of evidence. Direct or positive, and circumstantial. Direct and positive testimony is that which a person observes or sees or which is susceptible of demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of a party which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged; inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character, it is alone sufficient to convict. You will review all the circumstances in the light of this instruction.

You are instructed that you are not to consider any statements made or acts done by any defendant or other person named in the indictment in the absence of other defendants except against the individual making the statements, unless and until you find from the evidence beyond a reasonable doubt that the conspiracy was entered into as charged and further that such [33] statements or acts were made or done in furtherance of such conspiracy and that the defendant or other person named in the indictment so making such statements was authorized by the other defendant to make the statements in question, and in such case you will consider such evidence against the defendant, if any, actually making such statements or doing such

acts and such other defendant only as you shall be convinced from the evidence beyond a reasonable doubt, if you are so convinced, authorized the making of such statements and/or the doing of such acts.

If, however, you find from the evidence beyond a reasonable doubt that the alleged conspiracy did exist as charged and that one defendant or other person named in the indictment was, by an absent defendant, authorized to and did make a statement or do some act in furtherance of such conspiracy, then you may consider such statement or act against such absent defendant so authorizing it, as under all of these circumstances each conspirator, whether or not he is named in the indictment as a defendant, would be the agent of all the other conspirators, and the statements and acts of each conspirator, if made or done under all these circumstances, would be binding on all the conspirators.

You will consider all evidence admitted by the court before you, and you will disregard all evidence offered but not admitted by the court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions taken by counsel and you should not allow the making of objections and exceptions by counsel to confuse you.

Now, it is not necessary that the unlawful agreement be evidenced by any written instrument; it may be a verbal [34] understanding or agreement. Nor is it necessary that the making of that agreement be proven by direct or positive evidence; it may be proven by circumstantial evidence, by proof

of facts and circumstances, or by the acts of the parties, by what was done; and these facts and circumstances may be considered by you with the other testimony in the case in determining whether or not the conspiracy as alleged in fact existed. But, where circumstantial evidence alone is relied upon to establish the guilt of the accused, it must not only be consistent with his guilt, but inconsistent with his innocence, and must *exclude* every reasonable hypothesis other than that of his guilt.

It is not necessary that it be proven that the conspiracy was entered into on the date alleged in the indictment; it is only necessary that it be proven that it was formed within three years prior to the finding of the indictment, or, if earlier than that, that some overt act in furtherance of it was done within three years prior to the finding of the indictment.

The fact that the defendant, Perry V. Wilcox, was an officer in the Customs Service subordinate to the defendant George D. Hubbard, and was subject, in the performance of his duties, to the control and supervision of the defendant George D. Hubbard, would not preclude him from entering into a conspiracy with the said George D. Hubbard.

In the first count of the conspiracy indictment, the defendant Hubbard and Wilcox are charged with a conspiracy to embezzle. If you find that the defendants entered into the conspiracy with one another or with any of the others named in the indictment to appropriate to their own use or to the use of some one or more of them intoxicating

liquors which had been seized under the customs laws and were in the possession of the [35] defendant, George D. Hubbard, as Collector of Customs, and to deprive the true owner thereof, and some one of the acts alleged was done to further the conspiracy by some one or more of them, then under all those circumstances such one or ones of the defendants as you find became a party to such conspiracy, if you do so find, would be guilty as charged in count one of the conspiracy indictment.

In the second count of the conspiracy indictment against the defendants Hubbard and Wilcox, they are charged with a conspiracy to defraud the United States by obstructing, impairing or defeating the performance of a lawful function of the Treasury Department of the United States. In order to defraud the United States, it is not necessary that it suffer a pecuniary loss; it has been defrauded in the sense that word is used in the law, if the lawful operation of a department of the government has been impeded or obstructed. So, if you find that the defendants, or any one of them, conspired with themselves or with others named, to impair, obstruct or defeat the performance of a lawful function of government, and one of the acts alleged was done by any one of them to carry out the conspiracy, such one of them would be guilty of a conspiracy to defraud. So that, if you find that the defendants, or any one of them, conspired with some one or more of the others named either (1) to convert to their own use, or permit others to do so, liquors in the possession of the defendant George

D. Hubbard as Collector of Customs, or (2) to execute or cause others to execute false certificates of destruction, or (3) to make false entries in the records of "Receipts and Delivery of Seized Goods", they, or such one of them, would be guilty of a conspiracy to defraud the United States.

I charge you that it was a lawful function of the Government to destroy intoxicating liquor and to require its [36] employees to execute certificates of destruction and to keep a true and accurate record of liquors received and disposed of, and that the Treasury Department of the United States had promulgated such requirements which were in force and effect throughout the period covered by the indictment.

I have heretofore defined embezzlement. In the second case, the defendant George D. Hubbard alone is charged with embezzling eighty-four (84) quarts of intoxicating liquor which had been seized on board the motorship *Heranger*, and which came into his possession as Collector of Customs. If you find this liquor had been seized under the customs laws and did come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so with intent to deprive the true owners thereof, he would be guilty as charged.

You will consider each indictment separately and each count thereof and determine the guilt or innocence of each of the defendants charged therein. You will also determine the guilt or innocence of

each one of the defendants separately, and return your verdict accordingly.

You are not concerned with the punishment to be imposed, if you should find the defendants, or any one of them, guilty; that is a matter for the Court. On each indictment and on each count of the conspiracy indictment let your verdict be merely guilty or not guilty, as you may determine.

In your consideration of this case, you must not be swayed by passion or prejudice or by your sympathies. It is not for you to take into consideration the righteousness or unrighteousness of the laws with the violation of which these defendants are charged, and you are not to be concerned with whether or not others have been guilty of a like violation. You will determine from the evidence beyond a reasonable doubt solely and alone whether these defendants or any one of them are [37] guilty as charged, and you will return your verdict accordingly.

The indictments in these cases consolidated for trial will be sent to the jury room, merely to show you the paper charges against the defendants, but they are not to be considered as evidence. You will take with you to the jury room the exhibits in the case which are in evidence.

The verdicts provided for your use are in the usual form. As to each count as to each defendant in the conspiracy indictment, before the word guilty is a blank, and you will write in there the word "is" or the word "not" as you find. A simi-

lar blank is provided for recording your verdict as to defendant Hubbard alone in the embezzlement case against him.

It will require your entire number to agree upon a verdict, and when you have so agreed you will cause your verdicts to be signed by your foreman whom you will elect from among your number immediately upon retiring to the jury room, and return with your verdicts into court.

Counsel, have I overlooked anything? Are there any exceptions?

Thereupon and before the jury retired to deliberate upon its verdict, the following proceedings were had:

MR. SAVAGE: May I first express my admiration for Your Honor's fine, impartial and fair instructions.

I take exception to Your Honor's refusal to give defendants' requested instructions number 11 and 12.

THE COURT: The exception is allowed.

MR. SAVAGE: And, if Your Honor please, we except to Your Honor's instruction that a man cannot close his eyes to what is obvious, and that if one sees things done that would probably have the effect of furthering the conspiracy, there was a duty upon him to make an inquiry, as an incorrect statement of the law and,— [38]

THE COURT: The exception is allowed.

MR. SAVAGE: We except to Your Honor's instruction that the defendant had no right to give

the liquor or the alcohol, or to put it to any other use than government use, or to make any disposition of it other than for governmental purposes after having first obtained authority from the government so to do, and if he did give it to other parties or for other uses, he was guilty of embezzlement, on two grounds: In the first place, in cause No. 43403, he is not charged with embezzlement; and in the second place, there is no embezzlement unless there is a fraudulent appropriation to one's own use. The mere fact that liquor may be given for something else does not constitute embezzlement.

THE COURT: Exception allowed.

MR. SAVAGE: We except to Your Honor's instruction that the intent to defraud is presumed when the unlawful act is knowingly committed. The reason for the exception is that where intent is a specific ingredient or essential of a crime, then the specific intent to defraud must be proved, and it cannot be presumed.

THE COURT: Exception allowed.

MR. SAVAGE: We except to Your Honor's instruction with respect to indictment No. 43406, that if the defendant appropriated the liquor to his own use or permitted others to do so, he would be guilty of embezzlement, as being an incorrect definition of the crime of embezzlement.

THE COURT: The exception is allowed. And to each and every one of the requested instructions not given your objection is noted and an exception is allowed.

MR. SAVAGE: Thank you, Your Honor.

MR. ROBBINS: The defendant Wilcox desires to except to [39] the instruction with respect to the embezzlement in cause No. 43403, and also Your Honor's instruction with respect to intent, upon the same grounds advanced by Mr. Savage.

THE COURT: The exceptions requested on each and all of them are allowed.

MR. SULLIVAN: May I join in commending the court on the fine and impartial instructions which have been given.

MR. WHITAKER: I should also like to join.

THE COURT: The court is supposed to do its duty without commendation, and while he appreciates it, it is not necessary. I thank you just the same.

The jury will retire to the jury room and consider the verdict. After this, you will have to remain together and do not become separated, except under special *accomodations*,—

MR. SAVAGE: As far as the defendant Hubbard is concerned, if the jury arrives at a verdict this evening,—

THE COURT: That can be settled after the jury leaves. The Marshal will make arrangements for the housing of the jurors, under instructions which will prevent the jury from becoming separated. (to jury) You will at no time become separated until you arrive at a verdict.

I will instruct the jury this much further: That in case you arrive at your verdicts this evening at any time so that you can go to your several homes for the night, you can have the verdicts which you agree upon, signed by your foreman, put in an envelope which the bailiffs will provide, and sealed, and give them back into the possession of the foreman, and he, together with all the rest of you, may report to your homes for the rest of the night, separately, and you will return here in the morning at nine o'clock, instead of the usual time at ten. Come at nine o'clock, and your foreman will have with him the sealed verdicts. The foreman is to keep them in his possession at all [40] times after they are given to him. If you do render sealed verdicts, you will not speak to any one concerning what took place in the jury room until after the court has discharged you from further consideration of the case.

You may now retire to the jury room to consider the verdicts.

(Jury Retires)

The defendant prays that this, his Bill of Exceptions, may be allowed, settled and signed.

JOHN J. SULLIVAN
ANTHONY SAVAGE
Attorneys for Defendant

Settled and allowed on this 1st day of March, 1935.

JOHN C. BOWEN
District Judge

Received a copy of the within Bill of Exceptions
this 26 day of Feb., 1935

J. CHARLES DENNIS
Atty for Pltff. [41]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing twenty-nine (29) pages truthfully set forth proceedings had upon the trial of the defendant George D. Hubbard, *insofar* as they are stated. In addition to the testimony set out in said pages hereinabove, other testimony relevant to and tending to prove the guilt of the defendant with respect to the material allegations contained in the indictment herein was introduced, received, and considered. In addition, the Bill contains all instructions requested by the defendant, and all of the instructions given the jury by the Court at the conclusion of the case, together with the exceptions taken to the Court's refusal to give certain of the instructions requested, and also the exceptions taken by the defendant to certain of the instructions given, and the foregoing is hereby settled, allowed, and

the

certified as a Bill of Exceptions; and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

DONE in open court this 1st day of March, A. D. 1935.

JOHN C. BOWEN
United States District Judge

Presented by:

ANTHONY SAVAGE
JOHN J. SULLIVAN
~~U. S. Attorney~~
Attorneys for Defendant

O. K.

J. CHARLES DENNIS

U. S. Attorney [42]

[Endorsed]: Filed Feb 26 1935

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the defendant, George D. Hubbard, by John J. Sullivan and Anthony Savage, his attorneys, and in connection with his appeal herein, assigns the following errors which he avers occurred in the proceedings prior to the trial and on the trial of said cause, which were duly excepted to by him, and upon which he relies to reverse the judgment entered against him.

I

The District Court erred in overruling the defendant's demurrer to the indictment.

II

The District Court erred in instructing the jury as follows:

The Collector of Customs, during all of the times mentioned in the indictments, was an officer of the United States Government. As a part of his duties there came into his possession and control alcohol and intoxicating liquors. It was his duty, as Collector of Customs, upon receipt of alcohol and intoxicating liquors that came into his possession and control, to cause the same to be destroyed unless said alcohol and intoxi- [43] cating liquors could be used for official government purposes after authority for such use had been duly and regularly obtained from the Commissioner of Customs. Under the law he had no right to convert the alcohol or intoxicating liquors to his own use or to give it to any other person, or to exchange it for other alcohol without such authority. Therefore, if you find from the evidence that the defendant George D. Hubbard made any disposition of alcohol or intoxicating liquors other than the destruction of the same in accordance with the law, or the use of the same for governmental purposes after authority had been duly and regularly obtained, then the said defendant is guilty of the crime of embezzlement, as charged.

III

The District Court erred in instructing the jury as follows:

Intent is an ingredient of crime. It is psychologically impossible for you to enter into the mind of the defendants and determine the intent with which they operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all the circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. The color of the act determines the complexion of the intent. Intent to defraud is presumed when the unlawful act is proved to have been knowingly committed.

IV

The District Court erred in instructing the jury as follows:

If he gave it to one who was not entitled to its use and enjoyment, with the intent to deprive the true owner thereof, or permitted such person to take it and use it and enjoy it with the intent to deprive the true owner thereof, he is likewise guilty of the crime of embezzlement. [44]

V

The District Court erred in instructing the jury as follows :

I have heretofore defined embezzlement. In the second case, the defendant George D. Hubbard alone is charged with embezzling eighty-four (84) quarts of intoxicating liquor which had been seized on board the motorship Heranger, and which came into his possession as Collector of Customs. If you find this liquor had been seized under the customs laws and did come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so, with intent to deprive the true owners thereof, he would be guilty as charged.

VI

The District Court erred in refusing to *giving* defendant's requested instruction number XI :

The Court instructs you that it is the function of a lawsuit to get at the truth of a case and that it is the duty of the parties to a lawsuit to exhaust reasonably within their power, as the jury reasonably sees the power is within their reach, the avenues of testimony leading to a determination of the truth, and, in determining where the facts of this case lie, it is proper for you to look to the manner in which this case is presented to you to determine whether or not the parties to this case, either or both of them,

have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the reason of things, as these circumstances illuminate your judgment, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any proposition, who were not put upon the stand, you are permitted to draw such inferences as reasonable men would draw under such circumstances from the failure to employ such opportunity. *Young v. Corrigan*, 208 Federal Reporter 435. [45]

VII

The District Court erred in refusing to give defendant's requested instruction number XII:

If you find from a consideration of all the evidence in this case against the defendants or any of them, that the evidence so produced is as consistent with their innocence as with their guilt, then, I instruct you, as a matter of law, that you must return a verdict of not guilty against any such defendant or defendants. *Isbell v. United States*, 227 Federal Reporter 788, page 792.

VIII

The District Court erred in failing and neglecting to instruct the jury as to the meaning of the phrase "wrongful conversion". (The defendant made no request for such an instruction and took no exception to the court's failure to so charge.)

IX

The District Court erred in failing and neglecting to charge that intent to defraud is an essential ingredient of the crime of embezzlement and that before they could find the defendant guilty of that crime the existence of an intent to defraud must be established to their satisfaction beyond a reasonable doubt. (The defendant made no request for such an instruction and took no exception to the Court's failure to so charge.)

X

The District Court erred because all the reasons set forth in the foregoing assignments of error in denying the defendant's motion for a new trial.

XI

The District Court erred in pronouncing judgment upon the defendant. [46]

WHEREFORE the defendant prays that the judgment of said District Court against him be reversed and the cause remanded to the District Court with instructions to dismiss the same, and for such other and further relief as to the Court may seem proper.

JOHN J. SULLIVAN

ANTHONY SAVAGE

Attorneys for defendant

Service acknowledged this 26 day of February 1935.

J. CHARLES DENNIS

Attorney for Plaintiff [47]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, GEORGE D. HUBBARD as principal, and AMERICAN BONDING COMPANY OF BALTIMORE, as Surety, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of TWENTY FIVE HUNDRED (\$2500.00) Dollars, lawful money of the United States, to be levied on our goods, and chattels, lands and tenements, upon the following conditions:

The condition of this obligation is such that whereas the above named defendant, GEO. D. HUBBARD was on the 4th day of Feb. 1935, sentenced in the above entitled Court as follows: FEDERAL ROAD CAMP for 11 months and fine of \$1000.00

And whereas said defendant has sued out an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to review said judgment.

And whereas the above entitled Court has fixed the defendant's bond to stay execution of said judgment in the amount of Twenty five Hundred (\$2500.00) Dollars,

NOW, THEREFORE, if the said defendant GEORGE D. HUBBARD shall diligently prosecute said appeal and shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be by said Circuit

Court of Appeals, and shall not leave the jurisdiction of this Court without permission being first granted and shall render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, then this obligation shall be void, otherwise to remain in full force and effect.

GEORGE D. HUBBARD
AMERICAN BONDING COMPANY
OF BALTIMORE

By GUY LeROY STEVICK, JR.

Attorney in Fact (Seal) [48]

Approved this 4th day of March, 1935.

JOHN C. BOWEN

Judge.

O.K. J. CHARLES DENNIS

U. S. Atty.

[Endorsed] Filed Mar 4 1935 [49]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript on appeal including:

Indictment (43406)

Bill of exceptions and order settling and certifying same.

Assignments of error.
 Demurrer and ruling thereon.
 Motion for new trial and ruling thereon.
 Notice of Appeal.
 Bond on appeal.
 Verdict, judgment and sentence.

JOHN J. SULLIVAN
 ANTHONY SAVAGE
 Attorneys for Defendant.

Received a copy of the within Praeceptum this 4 day of March, 1935. J. Charles Dennis, Attorney for Pltff.

[Endorsed] : Filed Mar 4, 1935 [50]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
 COURT TO TRANSCRIPT OF RECORD
 ON APPEAL.

United States of America,
 Western District of Washington—ss:

I, EDGAR M. LAKIN, Clerk of the above entitled Court, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 15, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as the same remain of record and on file in my office, as is required by praecipe of counsel

filed and shown herein, with the exception of the Bill of Exceptions and Assignments of Error, the originals of which are transmitted with this transcript; and that the foregoing constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 12th day of March, 1935.

(Seal)

EDGAR M. LAKIN,
Clerk, United States District Court,
Western District of Washington,
By TRUMAN EGGER
Deputy. [51]

[Endorsed]: Transcript of Record. Filed March 14, 1935. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

